AMERICAN TELEPHONE AND TELEGRAPH COMPANY

IBLA 77-479 Decided October 18, 1977

Appeal from decision of the Utah State Office, Bureau of Land Management (BLM) requiring appellant to apply for an amendment of its communication right-of-way.

Reversed.

1. Rights-of-Way: Applications

Under existing regulations, no amended right-of-way application need be filed in connection with a change in the broadcast frequency of a microwave communications station where such change does not require any deviation from the location of a prior subsisting right-of-way grant.

APPEARANCES: Richard A. Bromley, Esq., San Francisco, California, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

American Telephone and Telegraph Company (AT&T) appeals from a decision of the Utah State Office, Bureau of Land Management (BLM) dated June 17, 1977, requiring AT&T to file an amendment to its right-of-way U-041343.

This right-of-way grant was originally made to AT&T on March 29, 1960, for the purpose of constructing and operating a microwave communications site on public land near Lund, Utah. On October 31, 1968, AT&T notified BLM of plans to alter transmitting and receiving frequencies at the site, stating that: "As new regulations under Title 47 CFR require that we submit proof of site availability as part of our FCC application, we would appreciate your early reply regarding these stations. It is not expected that any additional right of way will be necessary." On November 12, 1968, the Utah State Office issued its Notice of Site Availability, referring to AT&T's request

of October 31 as an "application * * * for modification of right of way" and further stated that "an amendment of the right of way will be issued by this office upon presentation of the FCC license for modification." On November 5, 1969, BLM, on its own motion, issued an "Amended Right-of-Way," which allowed for the installation of additional equipment but made no changes in the approved right-of-way location or in any other terms or conditions of the original grant. By letter dated February 25, 1977, BLM requested a "proof of construction" in connection with the above-described frequency change and AT&T responded by supplying the requested proof but protesting that there had been no change in the location of the original right-of-way and that an FCC frequency allocation was the only matter at issue. On May 16, 1977, however, the Utah State Office wrote to AT&T stating that the Act of March 4, 1911, "had been repealed and replaced by the Federal Land Policy and Management Act (FLPMA) of October 21, 1976." The letter went on to demand that AT&T, in connection with the 1968 frequency change, submit an application for amendment of its right-of-way under the new Act (FLPMA). The BLM letter required that the application for the amended right-of-way was to be accompanied by "a $ 250.00 non-returnable advance payment." BLM reaffirmed this position by letter-decision of June 17, 1977, and AT&T appeals from that holding.

[1] At the very outset we find that the October 31, 1968, request for a Notice of Site Availability involved no deviation whatever from the location of AT&T's original (1960) right-of-way. This fact alone is dispositive of the case before us in that the applicable regulation, 43 CFR 2802.2-4, plainly states: "No deviation from the location of an approved right-of-way shall be undertaken without prior written approval of the authorized officer. The authorized officer may require the filing of an amended application in accordance with 2802.1 where, in the authorized officer's judgment the deviation is substantial." (Emphasis supplied.) Since the original location of AT&T's right-of-way contains no mention of the sending or receiving frequencies to be utilized by the Lund microwave station, it follows logically that a change in these frequencies, without more, is not a "deviation from the location of an approved right of way."

BLM, in the decision below, mistakenly asserts that a deviation from such an original location can be found in any action by the right-of-way holder which precipitates a large amount of paperwork for BLM. There is no legal authority for this plainly wrong position and we note parenthetically that the work items claimed to be precipitated by AT&T's frequency change are all related to an FCC coordination program which was discontinued shortly before the decision below was issued. 1/

1/ See, 42 FR 27894, June 1, 1977.

We hold, moreover, that, even if AT&T in 1968 had undertaken a project involving a major physical deviation from its approved right-of-way, the issuance of an amended right-of-way in 1969 should have put an end to all questions involving the action. The passage of FLPMA does not affect the validity of rights-of-way which were issued in prior years. 2/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

2/ Section 509, FLPMA, 43 U.S.C. § 1769.